

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TED J. GRIMES,

Petitioner,

v.

ALICE PAYNE,

Respondent

CASE NO. C05-462JLR

REPORT & RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Ted Grimes is a state prisoner who is currently incarcerated at the McNeil Island Corrections Center in Steilacoom, Washington. He has filed a petition under 28 U.S.C. § 2254 to seek relief from the sentence imposed following his 1999 King County Superior Court convictions on theft charges. Respondent has filed an answer to the petition together with relevant portions of the state court record. Petitioner has filed a traverse to respondent's answer. The briefing is now complete and this matter is ripe for review. Following a careful review of the record, this Court concludes that petitioner's § 2254 petition should be denied and this action should be dismissed, without prejudice.

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PROCEDURAL HISTORY

On July 7, 1999, petitioner was found guilty, following a jury trial, on seven counts of theft in the first degree and one count of theft in the second degree. (Dkt. No. 15, Ex. 1; *see also*, Dkt. No. 4 at 1.) On September 10, 1999, petitioner was sentenced to an exceptional term of 60 months confinement. (*See id.*) On September 24, 1999, petitioner's counsel filed a notice of appeal. (*Id.*, Ex. 2.) In his opening brief in the Court of Appeals, petitioner, through counsel, presented the following issues for review:

1. Whether there was sufficient evidence presented from which the jury could conclude Grimes was guilty beyond a reasonable doubt of theft in the first degree, where the evidence showed Grimes acted according to the terms of his contractual agreements which provided only that he transfer §1031 proceeds as necessary to effectuate real estate exchanges? (Assignment of Error 1)

2. Whether the State was preempted from prosecuting Grimes under federal law? (Assignment of Error 2)

3. Whether Grimes was denied his right to a fair trial where the trial court added superfluous and prejudicial language to Grimes' good faith claim of title defense, Instruction 38? (Assignment of Error 3)

4. Whether Grimes was denied his right to a fair trial where the trial court obscured the distinction between escrow accounts and §1031 accounts in Instruction 20? (Assignment of Error 4)

5. Whether the trial court denied Grimes his right to a fair trial when it denied his proposed instruction relating to §1031 proceeds becoming assets of the qualified intermediary, Supp. CR __, Sub No. 51 (Defendant's Proposed Jury Instructions, filed June 7, 1999)? (Assignment of Error 5)

6. Whether the evidence presented at restitution establishes a causal connection between Grimes' acts and the victims' losses where the evidence arose out of bankruptcy court and it is not apparent from the record that Grimes had the opportunity to object to any of the bankruptcy court orders? (Assignment of Error 6)

7. Whether Grimes was denied a fair evaluation of his restitution amount where some of the damages are attributable to the State and/or the victims' actions? (Assignment of Error 6)

(*Id.*, Ex. 3 at 2-4.)

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Petitioner also filed a pro se brief in the Court of Appeals in which he presented one additional issue for review:

Whether Grimes was denied his right to a fair trial when the trial court removed his ability to conduct a defense which would demonstrate his lack of intent to commit theft.

(Dkt. No. 15, Ex. 4 at 1.)

On February 19, 2002, the Court of Appeals issued an opinion, published in part, in which it affirmed petitioner's convictions. (*Id.*, Ex. 8.) Petitioner thereafter filed a petition for review in the Washington Supreme Court. (*See id.*, Ex. 9.) Petitioner presented the following three issues to the Supreme Court for review:

1. Did the Court of Appeals permit the State to violate the Supremacy Clause of Article VI of the United States Constitution, by failing to recognize the inherent conflict between (a) a federal legislative scheme (26 U.S.C. § 1031) for the deferral of taxes on like-kind property exchanges governed by IRS regulations which mandate that the taxpayer *give up all property rights* during the exchange period in order to qualify for the tax deferral; and (b) a state court theft prosecution predicated upon state law recognition of *continued taxpayer property rights* during the same exchange period?
2. Did the Court of Appeals err in failing to recognize that state law relating to escrow is preempted by specific federal tax regulations that permit § 1031 exchanges to be undertaken through the use of a "qualified escrow agent" as that term is defined in the IRS regulations, thus violating Article VI of the United States Constitution?
3. Was Petitioner deprived of this Fourteenth Amendment Due Process rights when he was convicted of theft without sufficient proof of the element of exertion of unauthorized control over the § 1031 funds in his possession, based upon the erroneous belief that Petitioner was required to place these funds in escrow accounts, when in fact Petitioner's unrestricted right to use these funds as he pleased was a mandatory requirement of federal law?

(*Id.*, Ex. 9 at 1-2.) On January 8, 2003, the Supreme Court issued an order denying review without comment. (*Id.*, Ex. 14.) The Court of Appeals issued its mandate terminating direct review on January 17, 2003. (*Id.*, Ex. 15.)

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1 On June 30, 2004, petitioner filed *pro se* a personal restraint petition in the Washington
2 Supreme Court. (Dkt. No. 15, Ex. 16.) In his personal restraint petition, petitioner asserted that the
3 sentencing court erred in imposing an exceptional sentence above the SRA maximum prescribed range
4 for his offenses “based on the trial courts’ review of facts, which were not essential elements of the
5 State’s charges, violating several key provisions of the United States Constitution.” (Dkt. No. 15, Ex.
6 16 at 3.) On July 1, 2004, petitioner filed a motion for release from custody pending review of his
7 personal restraint petition. (*Id.*, Ex. 17.) Petitioner, through counsel, filed a renewed motion for
8 immediate release pending a decision in his case on September 20, 2004. (*Id.*, Ex. 20.)

9 On September 27, 2004, the state filed a motion to stay consideration of petitioner’s personal
10 restraint petition pending the Washington Supreme Court’s decision in *In re: Personal Restraint of*
11 *Swenson*. (*Id.*, Ex. 22.) Petitioner thereafter filed a brief in opposition to the state’s motion to stay
12 and a cross motion to consolidate his case with *Swenson*. (*Id.*, Ex. 23.) On November 18, 2004, the
13 Supreme Court Commissioner issued a ruling in which he denied petitioner’s motion to consolidate,
14 granted the state’s motion to stay, and denied petitioner’s motion for release pending resolution of his
15 personal restraint petition. (*Id.*, Ex. 25.) Petitioner’s subsequent motion to modify the
16 Commissioner’s ruling was denied on February 1, 2005.

17 On March 22, 2005, petitioner filed the instant petition for writ of habeas corpus under 28
18 U.S.C. § 2254. (Dkt. No. 4.) The petition was ordered served on respondent and respondent was
19 directed to file a response to the petition within 45 days. (Dkt. No. 5.) On April 22, 2005, petitioner
20 filed a motion for release pending review of his federal habeas petition. (Dkt. No. 10.) Respondent
21 opposed petitioner’s motion and, on May 17, 2005, this Court issued an Order denying petitioner’s
22 motion for release. As noted above, respondent has filed an answer to petitioner’s petition and this
23 matter is now ripe for review.

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GROUND FOR RELIEF

Petitioner presents the following ground for relief in his federal habeas petition:

Ground one: Loss of Liberty by refusing my release on Personal Recognizance or bail under Court Rule RAP 16.15, the State is in violation of my 5th, 6th and 14th Amendment rights.

(Dkt. No. 4 at 5.)

Petitioner offers the following facts in support of his single ground for relief:

I was given an exceptional sentence above the standard SRA range for my convictions, AFTER a jury trial, by a judge using uncharged aggravating factors and using the “by a preponderance of the evidence” standard instead of “beyond a reasonable doubt.” My case was final on direct review in January, 2003, well after APPRENDI and just like BLAKELY. I completed serving the maximum sentence of my standard range on May 25, 2004. The State continually refuses my release.

(*Id.*)

DISCUSSION

Respondent first argues in her answer to the petition that petitioner’s claim that the Washington Supreme Court erred when it denied his motion for release from custody is not a cognizable ground for federal habeas relief. Respondent further appears to argue that, to the extent petitioner’s petition can be interpreted as presenting a constitutional challenge to his exceptional sentence, the claim is unexhausted because his challenge to his sentence is still pending in the state courts. Finally, respondent appears to argue that petitioner is unlikely to prevail on the merits of his federal habeas claim because he fails to present any published federal case law demonstrating that the rule announced by the United States Supreme Court in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), has been applied retroactively to cases on collateral review.

Petitioner, in his traverse to respondent’s answer, asserts that the state misinterprets the issue presented in his federal habeas petition and that his sole federal habeas claim is as follows:

[T]hat he is currently being held on an exceptional sentence above the SRA maximum for his crime(s) of conviction where the aggravating factors justifying said sentence were not listed as a element of any crime; are not express statutory bases for a greater

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1 penalty; are not described in the information or proved before a jury; and are based on
2 a judges determination, by a preponderance of the evidence, that those factors existed,
3 in violation of the U.S. Supreme Courts' holding in Apprendi v. New Jersey, 530 U.S.
4 466 (2000) and reaffirmed in Blakely v. Washington, 159 L.Ed.2d 403 (2004) and
5 Grimes seeks habeas relief as he has already served more time than the SRA maximum
6 sentence for his crime(s) of conviction.

7 (Dkt. No. 17 at 3.)

8 Petitioner then argues that because he is only challenging the exceptional portion of his
9 sentence, and because he has already served more than the maximum of his allowable standard range
10 sentence, the state process is ineffective to protect his rights and, thus, the exhaustion requirement
11 should be excused under the circumstances of his case.

12 The Court begins with petitioner's contention that respondent misconstrued the claim
13 presented by petitioner in his federal habeas petition. A review of the petition, and of the supporting
14 documents provided by petitioner, satisfies this Court that petitioner's original intent was, in fact, to
15 challenge the Washington Supreme Court's refusal to grant his release from custody pending
16 disposition of his personal restraint petition. Petitioner's recent re-characterization of his claim is
17 likely attributable to the fact that this Court has already once concluded, in its Order denying petitioner
18 release from custody, that petitioner's challenge to the Washington Supreme Court's refusal to grant
19 him release from custody pursuant to a state procedural rule did not present a cognizable claim for
20 federal habeas relief.

21 Even assuming that respondent and the Court did previously misconstrue petitioner's claim,
22 and that petitioner actually did intend to present a constitutional challenge to his exceptional sentence,
23 this federal habeas action cannot proceed at the present time. The United States Supreme Court has
24 made clear that state remedies must first be exhausted on all issues raised in a federal habeas corpus
25 petition. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. §2254(b), (c). Exhaustion must be shown
26 either by providing the highest state court with the opportunity to rule on the merits of the claim or by
27 showing that no state remedy remains available. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir.

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1 1996)(citations omitted). The exhaustion requirement is a matter of comity, intended to afford the
2 state courts "the first opportunity to remedy a constitutional violation." *Sweet v. Cupp*, 640 F.2d 233,
3 236 (9th Cir. 1981). A federal habeas petitioner must provide the state courts with a fair opportunity
4 to apply controlling legal principles to the facts bearing on his constitutional claim. *Picard v. Connor*,
5 404 U.S. 270 (1971); *Anderson v. Harless*, 459 U.S. 4 (1982).

6 Petitioner argues that under the circumstances of his case the state process is ineffective to
7 protect his rights and that this Court therefore need not defer to the state judicial process. Petitioner
8 maintains that every day he serves in custody while awaiting a decision in his case is a day in excess of
9 the standard range for his offense and therefore constitutes illegal confinement. Petitioner goes so far
10 as to assert that the prosecutor handling his personal restraint petition, along with the Assistant
11 Attorney General handling this case, the Washington Supreme Court Commissioner, and the
12 Washington Supreme Court Justices are intentionally "slow-walking" the process in order to delay as
13 long as possible the lawful release of those held under exceptional sentences.

14 The Ninth Circuit has recognized that unreasonable or extraordinary delay in the state courts
15 can render the state corrective process "ineffective" within the meaning of § 2254(b) and that
16 exhaustion may be excused in such cases. *See Phillips v. Vasquez*, 56 F.3d 1030, 1035 (9th Cir. 1995).
17 However, petitioner has not satisfied this Court that exhaustion should be excused in this case.

18 Petitioner's personal restraint petition presents a challenge to his exceptional sentence under
19 *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Petitioner's case is currently stayed pending a
20 decision by the Washington Supreme Court in another case raising similar issues. The underlying case
21 has now been decided. *See State v. Evans*, 2005 WL 1403921 (Wash. June 16, 2005). It thus seems
22 likely that the stay will soon be lifted in petitioner's personal restraint proceedings and a

1 decision will be rendered. Under these circumstances this Court sees no reason to excuse the
2 exhaustion requirement.

3 CONCLUSION

4 For the foregoing reasons, this Court recommends that petitioner's federal habeas petition be
5 denied and that this action be dismissed without prejudice. A proposed order accompanies this Report
6 and Recommendation.

7 DATED this 27th day of June, 2005.

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10 JAMES P. DONOHUE
11 United States Magistrate Judge
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